

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

30931

FILE:

B-218063

DATE: April 5, 1985

MATTER OF:

Viatek, Inc.

DIGEST:

1. A protest concerning the unavailability of government furnished equipment to an offeror under a proposed sole-source procurement where the protester had actual notice of the basis of protest 3 months before filing the protest is untimely.
2. GAO will not review the Small Business Administration's denial of a certificate of competency in the absence of showing of possible fraud or bad faith.

Viatek, Inc., protests a proposed sole source award to Rockwell International Corp. under request for proposals (RFP) No. N00228-84-R-2372, issued by the Naval Supply Center, Oakland, California on September 5, 1984. The solicitation called for depot repair services, training, and logistical support for communications systems deployed in submarines and certain aircraft.

Viatek contends that it is capable of providing the requisite services and requests that the Navy either make government-furnished equipment now located at a Rockwell facility available to Viatek or reissue the solicitation on a competitive basis. The Navy argues that Viatek's protest is untimely since Viatek knew that the equipment (a complete terminal used for test purposes) was not available and that the Navy intended to make a sole source award 3 months before protesting to our Office on January 24, 1985.

We dismiss the protest.

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Notice that the Navy was conducting sole source negotiations was synopsized in the Commerce Business Daily (CBD) on June 27, 1984. The Navy issued the solicitation on September 5, 1984. Viatek indicates that it received an unsolicited copy in the mail before September 12, 1984 and that it also received copies of the three amendments. Viatek submitted a proposal by the October 5, 1984 closing date and between October 10 and November 8, had several telephone conversations with the Navy's contract negotiator. According to Viatek's own submission to our Office, the contract negotiator told Viatek's Executive Vice-President that the government-furnished terminal was required for performance of the contract and that it was not available to Viatek. The agency report indicates that this was because Rockwell was using it to perform other government contracts, and the Navy determined that concurrent use by more than one contractor would have an adverse impact on several vital programs.

Nevertheless, on December 6, 1984, a pre-award survey of Viatek was conducted which resulted in a negative recommendation; the contract negotiator told Viatek of the negative recommendation on December 10, 1984. Viatek then requested that the Navy refer the matter to the Small Business Administration (SBA) for a Certificate of Competency (COC). Viatek learned of the denial of the COC, on the grounds that Viatek could not perform the contract because it lacked the government-furnished equipment listed in the solicitation, on January 21, 1985. Viatek then protested to our Office.

Viatek argues that despite the CBD notice of June 27 1984, it did not believe that the procurement would be sole source or that the government-furnished equipment would not be available to it, since it had received the RFP in the mail and thus had assumed that the procurement was competitive. The protester cites Detroit Broach and Machine -- Reconsideration, B-213643.2, July 12, 1984, 84-2 CPD ¶ 43, in which our Office held that a protester was justified in awaiting a final agency decision concerning its participation in a procurement where it reasonably believed that it would be given an opportunity to submit a proposal for a requirement for which the agency was conducting sole source negotiations.

In this case, however, Viatek did submit a proposal, and it had actual notice of the fact that the government-furnished equipment was unavailable to it, as well as notice of the Navy's reasons for that decision, at the time of its October telephone conversations with the Navy's contract negotiator.

Our Bid Protest Regulations, at 4 C.F.R. § 21.2(a)(2) (1985), require that protests be filed in our Office not later than 10 days after the basis of protest is known or should have been known. If a protest has initially been filed with the contracting agency, any subsequent protest to our Office must be filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action under section 21.2(a)(3).

Thus, Viatek had only 10 days after the first telephone conversation in which to protest to our Office concerning the allegedly improper award to Rockwell and the unavailability of the government-furnished equipment. Even if we consider the October conversations in which Viatek sought clarification of the solicitation and corrective action as a timely protest to the agency, the contract negotiator's enunciation of the Navy's position would constitute the initial adverse agency action. Worldwide Marine, Inc., B-212640, Feb. 7, 1984, 84-1 CPD ¶ 152. The fact that Viatek continued to pursue the matter with the Navy and the SBA after this time does not affect the 10-day requirement for the timeliness of the protest to our Office. McGraw-Edison Co., B-213683, Feb. 14, 1984, 84-1 CPD ¶ 198.

In addition, Viatek had notice of the negative pre-award survey report and the reasons underlying that determination on December 10, 1984. It nevertheless did not protest to our Office until January 24, 1985, after receiving notice of the SBA's denial of the COC. Our Office will not review an SBA determination of non-responsibility for a small business concern under a particular procurement unless there is a showing of possible fraud or such willful disregard of facts as to

imply bad faith. Five Star Fabricators, Inc. --
Reconsideration, B-214594.2, May 22, 1984, 84-1 CPD ¶ 549.
The protester has not made such a showing.

We dismiss the protest.

A handwritten signature in cursive script, appearing to read "Ronald Berger".

Ronald Berger
Deputy Associate
General Counsel